(1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERRY A. CANALES,

Petitioner,

v.

TEXAS STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

AUGUSTIN RIVERA, JR.
DUNN, WEATHERED, COFFEY,
RIVERA, KASPERITIS
& RODRIGUEZ, P.C.
611 S. Upper Broadway
Corpus Christi, TX 78401
(361) 883-1594

SHARON E. CALLAWAY
Counsel of Record
MICHAEL J. MURRAY
CROFTS & CALLAWAY
A PROFESSIONAL CORPORATION
112 East Pecan Street
Suite 800
San Antonio, TX 78205
(210) 299-0272

Attorneys for Petitioner

191640

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires the State to satisfy the clear and convincing standard of proof in a disciplinary action to remove a judge, as mandated by thirty-eight states, rather than the mere preponderance of the evidence, allowed only by Texas and six other states?

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state judicial disciplinary tribunal from declaring, without any hearing on the issue, that a removed judge's accrued pension be forfeited because he pursued a right to appeal guaranteed by the state constitution and rules governing removal of judges?

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The Findings, Conclusions, and Recommendations of the Texas State Commission on Judicial Conduct (per Kathleen H. Olivares, Chair, Texas State Commission on Judicial Conduct) are not published, but are reprinted in their entirety in Appendix B to this Petition. The opinion of the Texas Review Tribunal (per state court appellate judges Barajas, Day, O'Neill, Ross, Nuchia, Guzman, and Marion, appointed by the Supreme Court of Texas) is reported at 113 S.W.3d 56 (Tex. Rev. Trib. 2003), and is reprinted in its entirety in Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Texas Review Tribunal entered its judgment on September 4, 2003; and the Supreme Court of Texas affirmed that judgment on September 24, 2004. (*Pet. App. C*). Jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the text of Section 1 of the Fourteenth Amendment to the United States Constitution and article V, section 1-a(9) of the Texas Constitution. (*Pet. App. D*).

STATEMENT OF THE CASE

This case arises out of the removal of state district court judge Terry A. Canales under a procedure set forth in article V, section 1-a of the Texas Constitution. *(Pet. App. D at 40-41a).* The Texas State Commission on Judicial Conduct based its recommendation of removal on a preponderance of the evidence standard of proof. The Review Tribunal appointed by the Supreme Court of Texas conducted its review under a

preponderance of the evidence standard. The Tribunal rejected Canales's argument that the serious nature of an action to remove an elected judge constitutionally compels the State to exceed a mere preponderance of the evidence and prove its allegations by clear and convincing evidence. *In re Canales*, 113 S.W.3d 56, 67-68 (Tex. Rev. Trib. 2003), *aff'd without opinion*, 47 Tex. Sup. Ct. J. 1248 (Sept. 24, 2004) *(Pet. App. A at 17a)*.

Proceedings before the Commission

In 1977, article V, section 1-a of the Texas Constitution was amended to create a Commission to assess judicial discipline.[1] *See* TEX. CONST. art. V, § 1-a, Historical Notes (Vernon 1993 & Supp. 2004). The rules applicable to an article V proceeding — the procedure by which Canales was removed from office — were promulgated by the Supreme Court of Texas in 1992 and denominated the Texas Rules for Removal or Retirement of Judges. Neither the Constitution nor the Rules makes reference to a standard of proof or review.

Generally, the Rules provide that the Commission will review any complaints it receives. If a complaint is found to have merit, the Commission issues an appropriate sanction. If, however, the Commission is unable to make a determination, the complaint becomes part of a public proceeding, known as a formal proceeding, which mirrors a civil lawsuit. TEX. R. REM'L/RET. JUDG. 3, 4, 5, 6, 9, 10.

Following a formal proceeding against Judge Canales based on charges of inappropriate, unsolicited, and sexually suggestive conduct (set forth in the Findings of Fact of the Commission

---

1. Article V is not the exclusive method for removal of judges in Texas. Article XV of the Texas Constitution provides for removal by the governor, by impeachment, and by practicing attorneys' petitioning the supreme court. TEX. CONST. art. XV, §§ 2, 6, 8.

(*R. 102*)[2] and the opinion of the Review Tribunal (*Pet. App. A*)), the Commission issued its Findings, Conclusions, and Recommendations. The Commission found that the alleged conduct violated section 1-a(6) of article V. It therefore recommended that Judge Canales be removed and forever barred from holding judicial office in Texas. (*Pet. App. B at 37a*). Canales objected to the sufficiency of the evidence supporting the findings, based on his denial that the incidents ever occurred and the uncorroborated nature of the complaints. He further argued that the findings and recommendations ignored evidence from two women who had been approached by his political enemies and solicited to fabricate accusations of sexual misconduct against Canales with promises of monetary gain. (*R. 107; II Tr. 495-503, 538-47, 554-65*) Canales also objected that the Commission's findings were based on only a preponderance of the evidence and that the Commission's failure to require clear and convincing evidence not only violated Texas law, but also infringed upon his constitutional right to due process of law. (*R. 116*). *See In re Laughlin*, 153 Tex. 183, 265 S.W.2d 805, 809 (1954) (holding that removal actions are of such a serious nature as to require proof by clear and convincing evidence).

Proceedings before the Review Tribunal

Because the Commission can only recommend removal, the Texas Supreme Court appointed a seven-member Review Tribunal (composed of justices selected from intermediate appellate courts). *See* TEX. CONST. art. V § 1-a(8), (9); TEX. R. REM'L./RET. JUDG. 11, 12(a). Such a tribunal has a

2. Citations to "R." refer to the documents filed with the Texas Supreme Court, whose clerk acted as the clerk for the Review Tribunal. *See* TEX. R. REM'L./RET. JUDG. 12(a). The document index number is given: the documents were not individually paginated. Citations to "Tr." refer to the transcript of the formal proceedings before the Commission.

constitutionally mandated duty to independently evaluate the Commission's recommendation. *In re Brown*, 512 S.W.2d 317, 320 (Tex. 1974) (per curiam) (interpreting article V, section 1-a(8)). Rejecting Canales' "clear and convincing" argument *(Pet. App. E at 44a)* and holding that the Commission's findings were supported by a preponderance of the evidence, the Review Tribunal affirmed the Commission's recommendation of removal and lifetime bar. *Canales*, 113 S.W.3d at 74. *(Pet. App. A at 29-30a)*. In commenting on the removal sanction, and without holding any additional hearings, the Tribunal also stated that if a judge contests an order of removal which is ultimately sustained, he forfeits all of his accrued retirement annuity. *Id.* at 73. *(Pet. App. A at 29a)*.

Appeal to the Supreme Court of Texas

On appeal to the Supreme Court of Texas provided by article V, section 1-a(9) (*Pet. App. D at 40-41a*), Canales again argued that due process mandates a stronger burden of proof than a preponderance standard. He further argued that the forfeiture of his accrued pension for pursuing the constitutionally guaranteed appeal also violated his due process rights. (*Pet. App. E at 42-43a*). Following a fully briefed appeal on the merits of the Review Tribunal's judgment of removal, the Supreme Court of Texas on September 24, 2004, by order and without written opinion, affirmed the Review Tribunal's acceptance of the Commission's recommendation of removal and lifetime ban from the state judiciary. 47 Tex. Sup. Ct. J. 1248 (Sept. 24, 2004) *(Pet. App. C at 39a)*.

REASONS FOR GRANTING THE PETITION

I.

Allowing Removal of an Elected Judge on Less Than Clear and Convincing Evidence Results in an Unconstitutional Deprivation of Due Process

> Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

A. Despite an Earlier Texas Supreme Court Holding That the Sanction of Judicial Removal Should Be Based on Clear and Convincing Evidence, Texas Allows Removal of Elected Judges by a Preponderance of the Evidence Standard

The United States Constitution guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. *(Pet. App. D at 40a).* The Texas Constitution expressly guarantees any judge against whom a formal proceeding is instituted the due process of law afforded to "any person whose property rights are in jeopardy in an adjudicatory proceeding." TEX. CONST. art. V,

§ 1-a(11). Both the Texas Constitution and the state removal rules are silent as to the State's burden of proof in a removal proceeding. However, the Supreme Court of Texas, fifty years ago, spoke to that issue, stating:

> In reaching our decision, we agree with the rule followed by the master that while the charges need be sustained only by a preponderance of the evidence, as distinguished from the rule in criminal cases of proof beyond a reasonable doubt, the serious nature of the proceeding in depriving one of a public office to which a majority of the electors have chosen him and in nullifying the choice of the electors ought, at the very least, to require proof by clear and convincing evidence.

In re Laughlin, 153 Tex. 183, 265 S.W.2d 805, 809 (1954) (removal of judge under presentment procedure of Texas Constitution article XV, section 6).

The Tribunal in this case cited a per curiam opinion issued 20 years after *Laughlin* in support of its application of the preponderance standard in this case. *Canales*, 113 S.W.3d at 66 (citing *Brown*, 512 S.W.2d at 319-20). *(Pet. App. A at 13a)*. The opinion in *Brown* simply ignored *Laughlin*'s unequivocal commitment to an elevated burden of proof in these types of proceedings.[3] The Texas high court had it very right in *Laughlin*

3. In *Brown*, the supreme court repeated the statement that the charges must be sustained by a preponderance of the evidence, but ignored *Laughlin*'s requirement of clear and convincing proof for removal of an elected judge. *Brown*, 512 S.W.2d at 319-20. Apparently, that change in the burden of proof went unchallenged. However, *Laughlin*'s allowance that charges may be sustained by a preponderance of the evidence must be read in light of the procedure at issue there. Under the constitutional presentment procedure of article XV of the (Cont'd)

— so right that a substantial majority (thirty-eight) of the states apply a clear and convincing evidence standard of proof in proceedings to impose judicial discipline,[4] some citing *Laughlin*

(Cont'd)
Texas Constitution, charges were presented directly to the state supreme court in an original proceeding; thus, the court first had to decide which charges had sufficient proof upon which to proceed. *Laughlin*, 265 S.W.2d at 808-09. It is at this stage that the *Laughlin* court spoke of preponderance of the evidence. Once the charges were determined, a master was appointed to take testimony and make a report to the court — after which the parties filed briefs and orally argued the factual and legal issues raised by the report. *Id.* When it reviewed the master's findings and made the decision whether to remove the judge from office, the *Laughlin* court then applied a clear and convincing standard of proof. *Id.* at 809-10. Under a section 1-a(6) removal, the Review Tribunal does not consider whether to go forward with the charges; it reviews the Commission's findings and recommendation.

4. *Boggan v. Judicial Inquiry Comm'n of State*, 759 So.2d 550, 554 (Ala.1999); *In re Curda*, 49 P.3d 255, 257 (Alaska 2002); *In re Lorona*, 875 P.2d 795, 797 (Ariz.1994); *Judicial Discipline & Disability Comm'n v. Thompson*, 16 S.W.3d 212, 215 (Ark.2000); *Fletcher v. Comm'n on Judicial Performance*, 81 Cal. Rptr.2d 58, 62 (Cal.1998); *In re Jones*, 728 P.2d 311, 312 (Colo.1986); *Patterson v. Council on Probate Judicial Conduct*, 577 A.2d 701, 707 (Conn.1990); *In re Buckson*, 610 A.2d 203, 217 (Del.Ct.Jud.1992); *In re Rodriguez*, 829 So.2d 857, 860 (Fla. 2002); *In re Inquiry Concerning a Judge*, 566 S.E.2d 310, 311 (Ga. 2002); *Idaho Judicial Council v. Becker*, 834 P.2d 290, 295 (Idaho 1992); *Judicial Inquiry Bd. v. Courts Comm'n*, 435 N.E.2d 486, 487 (Ill.1982); *In re McClain*, 662 N.E.2d 935, 937 (Ind.1996); *In re Platt*, 8 P.3d 686, 694-95 (Kan.2000); *Starnes v. Judicial Retirement & Removal Comm'n*, 680 S.W.2d 922, 923 (Ky.1984); *In re Fuselier*, 837 So.2d 1257, 1260 (La.2003); *In re Happ*, 566 A.2d 763, 764 (Md.1989); *In re King*, 568 N.E.2d 588, 599 (Mass. 1991); *In re Chmura*, 626 N.W.2d 876, 885 (Mich.2001); *In re Miera*, 426 N.W.2d 850, 853 (Minn.1988); *Miss. Comm'n on Judicial Performance v. Perdue*, 853 So.2d 85, 88 (Miss.2003); *Harris v. Smartt*, 57 P.3d 58,
(Cont'd)

directly[5] and most based on due process considerations. Siding with the majority, the ABA's model rules also provide that charges of judicial misconduct must be proven by clear and convincing evidence. *See* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT, Rule 7 (1994). Only seven states, including Texas, permit judicial sanctions supported by a preponderance of the evidence. [6]

(Cont'd)
79 (Mont.2002); *In re Complaint Against White*, 651 N.W.2d 551, 557 (Neb. 2002); *In re Fine*, 13 P.3d 400, 410 (Nev.2000); *In re Williams*, 777 A.2d 323, 327-28 (N.J.2001); *In re Castellano*, 889 P.2d 175, 179-80 (N.M.1995); *In re Hayes*, 584 S.E.2d 260, 266 (N.C.2002); *In re Disciplinary Action Against Hoffman*, 595 N.W.2d 592, 594 (N.D.1999); *Disciplinary Counsel v. Karto*, 760 N.E.2d 412, 417 (Ohio 2002); *Lavender v. Woodliff*, 605 P.2d 1338, 1338 (Okla.1979); *In re Gallagher*, 951 P.2d 705, 706 (Or.1998); *In re Cicchetti*, 743 A.2d 431, 443 (Pa.2000); *In re Sessions*, 538 S.E.2d 1, 3 (S.C.2000); *In re Heuermann*, 240 N.W.2d 603, 605 (S.D.1976); *In re Kroger*, 702 A.2d 64, 66 (Vt.1997); *Judicial Inquiry & Review Comm'n v. Lewis*, 568 S.E.2d 687, 689 (Va. 2002); *In re Disciplinary Proceeding Against Sanders*, 955 P.2d 369, 376 (Wash.1998); *In re Starcher*, 501 S.E.2d 772, 777 (W.Va.1998); *In re Johnson*, 568 P.2d 855, 868 (Wyo.1977).

A 39th state requires "convincing preponderance of the evidence." *In re McCormick*, 639 N.W.2d 12, 15 (Iowa 2002). Four jurisdictions have no reported cases on judicial discipline — D.C., Hawaii, New Hampshire, and Tennessee.

5. *See In re Hanson*, 532 P.2d 303, 308 (Alaska 1975); *In re Martinez*, 656 P.2d 861, 866 (N.M.1982); *In re Jordan*, 622 P.2d 297, 299-300 (Or.1981); *In re Pauley*, 314 S.E.2d 391, 399 (W.Va.1983).

6. *In re Cox*, 553 A.2d 1255, 1255 (Me.1989); *In re Baber*, 847 S.W.2d 800, 802 (Mo.1993); *In re Mogil*, 673 N.E.2d 896, 897 (N.Y.1996); *In re Arrigan*, 678 A.2d 446, 453 (R.I.1996); *In re Brown*,
(Cont'd)

B. Ascertaining the Appropriate Standard of Proof Is a Necessary Component of the Due Process Inquiry

Due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Court has long held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).[7] Necessarily, then, the due process inquiry implicates a concern for the nature of the interest that is at stake in the challenged proceeding. *See id.* at 571.

Concerns about the nature of the process that is due relate to, among other things, the burden of proof required to support an adverse official action. By imposing a particular burden of proof upon the State in certain proceedings, the Court engages in "more than an empty semantic exercise." *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166

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512 S.W.2d 317, 319-20 (Tex. 1974)(per curiam); *In re Worthen*, 926 P.2d 853, 865-66 (Utah 1996) (noting conflict between *Brown* and *Laughlin*); *cf. In re Complaint Against Grady*, 348 N.W.2d 559, 563 (Wis.1984) (accept disciplinary panel's findings of fact unless against great weight and clear preponderance of evidence).

7. The Court has long ago "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *See Graham v. Richardson*, 403 U.S. 365, 374 (1971). Thus, due process concerns are implicated when the governmental action threatens a "particularly important" individual interest. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

(4th Cir. 1971)). Where individual rights are at stake, "the standard of proof reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Thus, the standard of proof "is a crucial component" of the due process inquiry and functions primarily "to minimize the risk of erroneous decisions." *See Santosky v. Kramer*, 455 U.S. 745, 785-86 (1982) (Rehnquist, J., dissenting). The applicable burden of proof mandated by the due process guarantee in any given proceeding "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Id.* at 755.

A burden of proof, therefore, exemplifies societal choices concerning the certainty that should attach to particular adjudicative events:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington, 441 U.S. at 423. The relative need for certainty is, essentially, inversely proportional to societal willingness to allocate the risk of error to the party whose rights are in jeopardy. *See Santosky*, 455 U.S. at 755; *see also Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990); *Addington*, 441 U.S. at 423.

Allocating the burden of proof is "the kind of question which has traditionally been left to the judiciary to resolve." *See Santosky*, 455 U.S. at 755-56 (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)). Judicial assessments of the nature of the

process due turn on the balancing of three factors: (1) the private interests affected by the particular proceeding; (2) the allocation of the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting the use of the challenged procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Santosky*, 455 U.S. at 754. Applying the *Eldridge* factors "to determine whether a particular standard of proof in a particular proceeding satisfies due process" necessarily compels a flexible, case-by-case inquiry. *Santosky*, 455 U.S. at 754. The nature of the process due, then, depends upon the circumstances of a particular case. *Morrissey*, 408 U.S. at 481 ("not all situations calling for procedural safeguards call for the same kind of procedure"); *see also Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 12 (1979).

Such flexibility does not, however, permit the use of differing standards in substantially similar cases or mid-course modifications of the applicable burden: "Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance." *Santosky*, 455 U.S. at 757. In the same regard, the prospect of appellate review is insufficient, standing alone, to cure the harm resulting from the application of an inadequate burden of proof. *See Woodby*, 385 U.S. at 282.

Along with the *Eldridge* factors, other variables are properly considered in determining the constitutionality of applying a particular burden of proof to a particular type of proceeding. For instance, in imposing an elevated burden of proof, the Court has demonstrated particular concern for the finality of the decision resulting from the proceeding and the irrevocability of its adverse effect on an identifiable and significant individual interest. *See, e.g., Cruzan*, 497 U.S. at 283 (mandating proof of desire to terminate medical treatment by clear and convincing

evidence); *Santosky*, 455 U.S. at 759 (mandating that parental neglect be established by clear and convincing evidence before termination of parental rights); *see also Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) ("the possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests."). This follows from the precept that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (quoting *Joint Anti-Facist Refugee Comm.*, 341 U.S. at 168 (Frankfurter, J., concurring)). But the Court has also recognized that the constitutional need to elevate the standard of proof does not arise entirely from the specter of a final and irrevocable loss of a substantial individual interest; heightened burdens of proof apply to many reversible determinations as well. *See, e.g., United States v. Salerno*, 481 U.S. 739, 751 (1987) (detention without bail); *Addington*, 441 U.S. at 427 (civil commitment); *In re Winship*, 397 U.S. 358, 364 (1970) (determination of juvenile delinquency).

Furthermore, a State's allocation of the burden of proof, while certainly entitled to some degree of deference, is not dispositive of the federal due process inquiry. *See Santosky*, 455 U.S. at 755. Indeed, "the 'minimum requirements of procedural due process being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Id.* The choice of a majority of jurisdictions, however, is a fact that is not without significance in this analysis. *See, e.g., id.* at 767 (noting, in applying clear and convincing burden of proof to proceedings to terminate parental rights, that 35 states apply that or a more stringent burden in such cases); *cf. Rivera v. Minnich*, 483 U.S. 574, 579 (1987) (noting, in applying preponderance of the evidence

standard to paternity proceeding, that many state legislatures had chosen to apply that less stringent burden in such cases); *see also Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (suggesting a powerful presumption of validity for legislative judgments that accord with the "dominant opinion" throughout the country and are consistent with "the traditions of our people and our law.").

C. Due Process Mandates a Heightened Burden of Proof in Proceedings to Remove Elected Judges

A requirement of proof by "clear and convincing" evidence is necessary "to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Santosky*, 455 U.S. at 756. The clear and convincing burden of proof directs the factfinder to consider both the quality and quantity of the evidence. *See In re Winship*, 397 U.S. at 371 n.3 (Harlan, J., concurring). The standard accomplishes two equally-laudable goals: it impresses upon the factfinder the importance of the decision to be made and, at the same time, reduces the chances of an erroneous determination. *See Addington*, 441 U.S. at 427. Thus, the Court has imposed the clear and convincing burden of proof "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Cruzan*, 497 U.S. at 284 (discontinuation of treatment to person in permanent vegetative state); *Salerno*, 481 U.S. at 751 (detention of arrestee without bail); *Santosky*, 455 U.S. at 756, 768 (termination of parental rights); *Addington*, 441 U.S. at 424 (civil commitment); *Woodby*, 385 U.S. at 285 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization).

1. *The Private Interests Involved in Proceedings to Remove an Elected Judge Are of Constitutional Magnitude, Entitling the Judge to the Protections Afforded by the Due Process Clause*

The Court at one point held that an elected official lacks a cognizable property interest in his or her position. *See Taylor v. Beckham*, 178 U.S. 548, 577 (1900). But by subsequent decisions, the Court has defined the concept of "property" more broadly and has, accordingly, extended the reach of procedural protections afforded by the Due Process Clause to include more and more "property" interests. *See, e.g., Roth*, 408 U.S. at 577 (suggesting that any grant of "entitlement" under state law may constitute "property"). This evolving definition of "property" has led to widespread confusion among lower courts[8] faced with

8. Lower state and federal courts have held that election to public office imbues the office holder with a constitutionally protected property interest. *See Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Gordon v. Leatherman*, 450 F.2d 562 (5th Cir. 1971); *see also, e.g., Brown v. Perkins*, 706 F. Supp. 633, 634 (N.D. Ill. 1989) ("lower courts . . . have assumed" that elected officials may have property interests in their offices); *Fredericks v. Vartanian*, 529 F. Supp. 264, 267 (D. Mass. 1981) (state statute creates a property interest in an elected office), *aff'd*, 694 F.2d 891 (1st Cir. 1982); *Fair v. Kirk*, 317 F. Supp. 12, 14 (N.D. Fla. 1970)(elected county supervisor of elections had property interest in office), *aff'd*, 401 U.S. 928 (1971); *Ludowici v. Stapleton*, 375 S.E.2d 855, 856 (Ga.1989) (mayor had property interest in elected office); *Errichetti v. Merlino*, 457 A.2d 476, 490-91 (N.J. Super. 1982) (state senator had property interest in office); *Butler v. Cocke County*, 671 S.W.2d 847, 848 (Tenn. Ct. App. 1984) (elected county executive had property interest in office). Likewise, several lower courts have concluded that election to state office does not create a constitutionally protected property interest. *See, e.g., Rabkin v. Dean*, 856 F. Supp. 543 (N.D. Cal. 1994); *Slawik v. State*, 480 A.2d 636, 644 (Del.1984); *Burrage v. New Hampshire Police Standards & Training Council*, 506 A.2d 342 (N.H. 1986); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (N.Y. Sup. Ct. 1993); *Sweeney v. Tucker*, 375 A.2d 698 (Pa.1977).

determining if elected officials possess a constitutionally protected property right in their offices. *See* Mark R. Fitzgerald, Comment, *Should Elected Officials Have a Property Interest in Their Positions?*, 1995 U. CHI. LEGAL F. 365, 375-80 (1995). It is fair to say that the continuing vitality of the *Taylor* holding appears to be the subject of some dispute within the nation's courts. *Id.*

This Court has recognized that, where provided by state law or some other mechanism, a public employee may have a constitutionally protected interest in continued employment. *See Roth*, 408 U.S. at 578. The Court has not, however, directly addressed the unique and manifold interests which attach to elected members of a state judiciary. But state courts faced with the issue have found that proceedings to remove elected state judges implicate significant interests running both to the judge and to the electorate.

As the Texas Supreme Court emphasized in *Laughlin*, a judicial removal action is a serious proceeding that may deprive a judge of a public office to which a majority of the voters have elected her or him; thus, removal of an elected judge essentially nullifies the choice of those voters. 265 S.W.2d at 809; *see also In re Martinez*, 656 P.2d 861, 866 (N.M.1982). Almost fifty years after *Laughlin*, the Supreme Court of North Carolina echoed that concern, noting that fundamental due process and fairness are required at every step of a judicial disciplinary process because the removal of a judge is a very serious matter indeed:

> The more serious consequence is that the people, who elected him to be their judge, are deprived of his services for the remainder of his term. It is not a light thing for this Court to assume the power to say to the people of North Carolina, "You have lawfully

> elected this judge, but we have determined that he cannot serve you."

In re Hayes, 584 S.E.2d 260, 266 (N.C.2002). An elevated burden of proof is compelled equally by the magnitude of the impact upon the judge, who, in being deprived of the public office to which he or she has been elected, is severely sanctioned. *See, e.g., In re Hanson*, 532 P.2d 303, 308 (Alaska 1975); *In re Rome*, 542 P.2d 676, 684 (Kan.1975); *In re Diener*, 304 A.2d 587, 594 (Md.1973); *In re Williams*, 777 A.2d 323, 327-28 (N.J. 2001); *In re Heuermann*, 240 N.W.2d 603, 605-06 (S.D.1976); *In re Pauley*, 314 S.E.2d 391, 399 (W.Va.1983). Removal not only deprives a judge of the honor, power, and emoluments of the office for the remainder of his or her term, but also may permanently disqualify the judge from holding any state judicial office. That is indeed a grave matter. *Hayes*, 584 S.E.2d at 399; *Rome*, 542 P.2d at 684.

Furthermore, some states have noted concerns about a critical factor in this case: the fact that the unique nature and function of the judiciary can make it the target of dissidents. *In the Matter of Cieminski*, 270 N.W.2d 321, 326 (N.D.1978); *Pauley*, 314 S.E.2d at 399-400. With a mere preponderance of the evidence requirement, it is not merely conceivable, but altogether likely that a single dissident can effectively negate the electorate's choice by winning a swearing match against the targeted judge — as was the case here. Application of a clear and convincing standard of proof and review severely attenuates or wholly eliminates that possibility. *See Hayes*, 584 S.E.2d at 270-71 (equivocal, ambiguous, and sharply conflicting evidence made in the context of allegations of a conspiracy to remove the judge from office cannot establish removable misconduct by clear and convincing evidence).

The *Santosky* majority expressed a concern for the failure to meaningfully address the interests of third parties in availing procedural safeguards to those whose interests are in jeopardy. *See Santosky*, 455 U.S. at 759-60 (citing concerns for omitting children and foster parents from the fact-finding and adjudicative processes). It stands to reason that a state's efforts to remove an elected judge from office will, in the vast majority of cases, run contrary to and, in effect, nullify the interests of the electorate who selected that individual to serve in that particular judicial position. The problematic nature of that realization is made even more acute by the fact that as many as "39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both." *Republican Party of Minnesota v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) (citing American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (Apr. 2002)); *see also* Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 187 n.2 (1996).[9] Permitting the removal of elected judges based on a mere preponderance of the evidence — a standard that, again, allocates a significant share of the risk of an erroneous decision to the disciplined judge — provides an enticing means for a disaffected political minority to override the expressed will of the electorate.

It is no answer that a diminished evidentiary burden will permit the State to further a public interest in assuring

9. Among the 39 states that permit any form of popular judicial election — partisan election, non-partisan election, or retention election — only Texas, Missouri, New York, Utah, and Wisconsin permit judicial removal based on a preponderance of the evidence. Of those five states, only Texas selects judges exclusively by partisan election. *Compare* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL'Y 273, 314-60 (2002) *with supra* notes 4-6.

appropriate judicial behavior by offering an easy means for aggressively enforcing standards of conduct. While recognizing that an individual interest may be subordinated to the greater needs of society in certain circumstances, the Court has rejected the suggestion that an amorphous public benefit justifies the imposition of lower burdens of proof. For example, in recognizing that there is certainly some form of public benefit that flows from ensuring the commitment or detention of individuals who may be dangerous to society, the Court has recognized that the fulfillment of such a benefit is, in and of itself, insufficient to overbear the individual liberty interest that commitment and detention seek to limit. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (finding of dangerousness, standing alone, is not sufficient ground to justify involuntary commitment); *see also Salerno*, 481 U.S. at 750-51 (probable cause to believe that arrestee committed the charged crime is not sufficient ground alone to justify detention without bail). In both of those situations, the Court compelled the State to prove another significant fact, and to do so by clear and convincing evidence, before endorsing infringement of the individual interest, despite the coincidental public benefit that might flow from the infringement.

While the public interest in policing judicial conduct is not insignificant, it is necessarily outweighed by both the substantial majoritarian interest in assuring the sanctity of public elections and the significant individual property interest associated with serving out the term to which one is elected. By its very nature, a proceeding to remove an elected judge from office goes beyond simple infringement of a property interest; such proceedings affirmatively seek to terminate that interest. *See, e.g., Santosky*, 455 U.S. at 759 (proceeding to terminate parental rights seeks to extinguish the liberty interest involved with parent-child relationship). In a proceeding to remove an elected judge, the

consequence of a victory by the State is the final (and often irreversible) termination of the disciplined judge's property interest in maintaining his or her elective office. *See Santosky*, 455 U.S. at 759. As is true in the many other circumstances in which the Court has considered the constitutional propriety of a particular burden of proof, the finality and irreversibility of the determination weighs heavily against permitting removal based upon the mere preponderance of the evidence. *See Salerno*, 481 U.S. at 751 (detention); *Santosky*, 455 U.S. at 768 (parental rights); *Addington*, 441 U.S. at 426 (civil commitment); *Woodby*, 385 U.S. at 285 (deportation); *Chaunt*, 364 U.S. at 353 (denaturalization); *Cruzan*, 497 U.S. at 284 (discontinuation of treatment).

Imposition of an elevated burden provides greater assurance that the substantial individual interest in elective office will be protected from the irrevocable finality of removal, except in those cases where the evidence convincingly establishes a need for removal. At the same time, application of an elevated burden of proof serves to protect the substantial public interest in maintaining the near inviolability of the electoral process. The service of each of those interests only incidentally interferes with the public interest in policing judicial conduct. And, perhaps most importantly, the application of an elevated standard of review appropriately ensures that the risk of an erroneous adjudication is allocated primarily to the State. Thus, the first *Eldridge* factor weighs heavily in favor of applying an elevated burden of proof in proceedings to remove elected state judges from office.

2. *An Elevated Burden of Proof Properly Allocates the Risk of Error to the State While Affording Necessary Protection to the Individual Interests at Stake*

The second *Eldridge* factor, when applied to a situation in which the constitutionally mandated burden of proof is in dispute, contemplates a weighing of the risk of an erroneous deprivation of private interests resulting from the application of a lower evidentiary burden against the likelihood that a heightened burden would minimize or reduce such a risk. *See Santosky*, 455 U.S. at 761 (citing *Eldridge*, 424 U.S. at 335). In that regard, "the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding" between the State and the judge being disciplined. *Id.* This inquiry is grounded in bedrock principles that define the minimum procedural protections necessary to ensure due process of law: the more significant the State's proposed impairment of a protected property right is — i.e., the more likely the individual is threatened with "a significant deprivation of liberty" or "stigma" — the more the State should bear the risk of an erroneous judgment. *See Santosky*, 455 U.S. at 756; *Addington*, 441 U.S. at 425-26.

A proceeding to remove an elected judge is not unlike a criminal trial in that it pits the State and its ample resources directly against an individual. Similar to the parties' relative postures in a parental termination proceeding, in a judicial removal proceeding, "[t]he State's ability to assemble its case almost inevitably dwarfs [the judge's] ability to mount a defense." *Santosky*, 455 U.S. at 763. The prejudice evident from that truth is only exacerbated by the fact that such proceedings may, as this case readily illustrates, be instigated upon the barest of allegations and under the most curious of political circumstances. Often, the charges that form the basis for the removal proceeding are not objectively verifiable, creating the

realistic possibility that a judge will face a series of accusers left with only a denial as a defense. Weighing the accusation against a denial is complicated by the fact that judicial removal proceedings have not, as has long been acknowledged, been governed by precise substantive standards. *See* Recent Case, *Courts—Judicial Removal—Establishment of Judicial Commission for Removal of Judges Precludes Legislative Investigation of Judicial Misconduct*, 84 HARV. L. REV. 1002, 1008 (1971) (suggesting that the absence of bright-line standards concerning a judge's private conduct makes assessing the propriety of such conduct a matter of subjective determination). The absence of precise standards makes the resulting sanction a product of subjective determinations by a factfinder who, in many cases, "possesses unusual discretion to underweigh probative facts that might favor [the judge]." *See Santosky*, 455 U.S. at 762.

In the context of the removal proceeding itself, the effect of this substantive favoritism for the State is significant. But it is compounded by the State's disproportionately favorable procedural position. In Texas, no provision of the applicable rules or constitution precludes the Commission from relying on previously adjudicated conduct in prosecuting a subsequent action for judicial removal. That rule mirrors the widely shared conclusion that earlier judicial disciplinary proceedings have no preclusive effect and implicate no double jeopardy concerns, permitting the very facts that formed the basis for an unsuccessful disciplinary effort in the first instance to be employed by the State in subsequent efforts to either prove misconduct or to enhance the resulting sanction. *See, e.g., In re Lee*, 336 So.2d 1175, 1177 (Fla.1976); *State v. Russell*, 610 P.2d 1122, 1130 (Kan.1980); *In re Quirk*, 705 So.2d 172, 188 (La.1997); *In re Oxman*, 437 A.2d 1169, 1173 (Pa.1981); *In re Discipline of Harding*, No. 20020535, 2004 WL 2709587,

at *16 (Utah Nov 30, 2004). In a situation where the State does not prevail in its first effort, no mechanism precludes the State from seeking additional or better evidence and undertaking repeated efforts to secure the judge's removal. Thus, a judge who manages to repel an initial removal effort obtains no guarantee that he or she will not again be forced to defend against the same allegations in some fashion.

Permitted to prove its case by only a preponderance of the evidence, the State enjoys significant procedural and substantive advantages while bearing little risk of an erroneous adjudication. Use of the preponderance standard suggests that society equally values an erroneous removal and erroneous failure to remove. *See generally In re Winship*, 397 U.S. at 371 (Harlan, J., concurring). But such a conclusion ignores the reality of the situation. For the State, the consequence of an erroneous failure to remove the judge is a momentary complication that does nothing other than assure the preservation of the status quo — and where the judge has been elected, maintenance of the will of the voters — with an assurance that it may undertake future efforts to achieve its disciplinary goal. For the judge subjected to a removal proceeding, the consequence of an erroneous removal is the final, irrevocable, and unwarranted end of his or her judicial career. It is difficult to imagine a more substantial disparity between two outcomes.

Recognizing the inherent imbalance created by the relative severity of the consequences faced by each side in the removal process, the majority of States afford the procedural protections of the clear and convincing burden of proof in judicial disciplinary procedures.[10] The imposition of that burden acknowledges that the State, which faces a far less severe outcome where it must sustain the effect of an error, should

10. *See supra* note 4.

properly bear the greater risk of an erroneous judgment. *See Santosky*, 455 U.S. at 766. The second *Eldridge* factor, therefore, also weighs in favor of imposing an elevated burden of proof in proceedings to remove elected judges.

3. *The Governmental Interest in Resisting Application of the Clear and Convincing Standard Is Comparatively Slight*

The state interests served by a judicial removal proceeding are best characterized as an interest in maintaining the integrity or dignity of the judiciary and the implicit promotion of a corollary deterrent effect arising from aggressive prosecution of misconduct. But the imposition of an elevated burden of proof is not necessarily inconsistent with the pursuit of those State interests. So true is that observation that the clear majority of states have voluntarily chosen to require proof of actionable misconduct by clear and convincing evidence as a predicate to removal.

As noted, the enhancement of the burden of proof reduces the likelihood of factual errors leading to permanent judicial removal. *See Santosky*, 455 U.S. at 761 (citing *Eldridge*, 424 U.S. at 335). Imposing the clear and convincing burden to judicial removal proceedings achieves that end without significantly interfering with the State's interest in prosecuting judicial misconduct. *See* MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT, Rule 7 commentary (1994) ("The [clear and convincing] standard of proof required to sanction a respondent's conduct is thus commensurate with the importance of protecting the judicial system's ability to function — more than required to prove a private wrong, less than required to prove a criminal offense."). The clear and convincing burden does not demand so much evidence that the State's ability to effectively oversee the judiciary is impaired. *See, e.g., In re Heuermann*, 240 N.W.2d

603, 606 (S.D.1976); *cf. Addington*, 441 U.S. at 428-29 ("Nor should the state be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests."). A heightened burden of proof does not increase the financial burdens on the State; if anything, the imposition of a heightened burden of proof may induce a greater reluctance to seek removal in marginal cases. Finally, imposing a more substantial burden of proof creates no administrative burdens, since state adjudicatory bodies are familiar with the burden from its repeated application in a variety of circumstances. Thus, the third *Eldridge* factor also favors a constitutional requirement that states be required to adduce clear and convincing evidence of a judge's misconduct before imposing a sanction of removal.

D. In Sum, Judicial Removal Proceedings Require a Clear and Convincing Standard of Proof and Review

Ignoring both the *Laughlin* opinion and the tenets of due process, Texas now permits judicial sanction with very little confidence in the correctness of the factual basis for removing judges from their benches. A swearing match in a highly charged political environment tinged with the motivation of revenge will suffice, as it did in the removal of Judge Canales; but it should not, for many reasons — primary among them the constitutional guarantees of fairness and due process to all. State promulgation of rules concerning judicial conduct and judicial discipline is circumscribed by the truth that the individual decision to seek elected judicial office does not oblige the categorical surrender of valuable constitutional rights. *See, e.g., White*, 536 U.S. at 787-88 (holding that state law restricting speech by candidates for judicial election violates the First Amendment).

To state the obvious, the removal of Judge Canales, or any elected judge, from office and the further lifetime bar from

judicial service is to deny the judge a most important interest, far more substantial than the mere loss of money in the imposition of a significant professional and private lifetime stigma. Removal also nullifies the will of the electorate. To permit removal by the mere preponderance of the evidence violates the due process guarantee that the Constitution demands and Texas, in fact, inherently recognized fifty years ago.

II.

Removal of Pension Benefits for Taking an Appeal Guaranteed by the Texas Constitution Is Also a Serious Deprivation of Constitutional Due Process

To compound the violation of due process rights, the Review Tribunal, without affording any hearing and in direct contradiction of two provisions of the Texas Constitution concerning removal of an incumbent judge, erroneously concluded that the severity of the sanction of removal requires that the offending judge forfeit all of his retirement annuity if he contests the recommendation of removal.

A. Removal Under Section 1-a(6) Is Neither an Impeachment Nor "Official Misconduct"

The Texas Constitution expressly provides that in the event a Review Tribunal orders the removal of an incumbent judge, "[t]he rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary." TEX. CONST. art. V, § 1-a (9) (*Pet. App. D at 40a*). Although the Commission neither prayed for nor requested the forfeiture of pension benefits at any point during the course of the formal proceeding, the Review Tribunal, in an outright contradiction of the Texas Constitution, concluded:

> The severity of contesting the recommendation of removal from office is illustrated by the fact that if

> the order of removal is sustained, the offending judge forfeits all of her or his retirement annuity. Respondent has chosen to contest the recommendation of removal.

Canales, 113 S.W.3d at 73. *(Pet. App. A at 27a).*

The sentence immediately preceding the section 1-a(9) declaration that an incumbent judge retains his or her benefits provides: "The review tribunal, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future." TEX. CONST. art. V, § 1-a(9). Thus, the clear reference of "so retired" is to incumbent judges who have been involuntarily retired or removed from office — even including those who may be barred for life.

In support of its conclusion, the Review Tribunal cited sections 834.004 and 839.003 of the Texas Government Code, which provide, in identical language:

> An annuity that is based on service of a member who is removed from judicial office by impeachment, or otherwise for official misconduct, may not be paid under this subtitle.

TEX. GOV'T CODE ANN. §§ 834.004, 839.003 (Vernon 2004).

This particular removal proceeding was brought under article V, section 1-a of the Texas Constitution and is neither an impeachment proceeding nor a criminal prosecution for "official misconduct." Impeachment is addressed in article XV and involves the returning of articles of impeachment by the Texas House of Representatives, which must be tried in the Texas Senate. TEX. CONST. art. XV, §§ 1, 2. "Official misconduct," as contemplated by the Texas Constitution and Texas Government Code, is a criminal offense, requiring criminal indictment,

prosecution and conviction; and jurisdiction for the prosecution of an "official misconduct" offense is vested in the district and county courts of Texas. *See* TEX. CONST. art. V, § 1-a(6) (judge may be suspended from office by Commission upon being indicted for felony offense or charged with "a misdemeanor involving official misconduct"); TEX. GOV'T. CODE ANN. § 33.001(d) (Vernon 2004) ("misdemeanor involving official misconduct" includes a misdemeanor involving an act relating to a judicial office or a misdemeanor involving an act involving moral turpitude); TEX. GOV'T CODE ANN. § 33.038 (Vernon 2004) ("automatic" removal where a judge is convicted of a felony or "a misdemeanor involving official misconduct"); *Campos v. State*, 783 S.W.2d 7, 8 (Tex.App.—Houston [14th Dist.] 1989, pet. ref'd). Because Judge Canales was neither impeached nor convicted of a felony or "official misconduct," forfeiture of his pension was not allowed under Texas law, contrary to the Tribunal's conclusion.

B. The Tribunal's View of Pension Forfeiture for Prosecuting an Appeal Violates Both Due Process and an Express Provision of the Texas Constitution Regarding Pension Rights of a Removed Judge

The Review Tribunal imposed its penalty, which violates Texas law, without affording Canales a hearing on the matter, and it conditioned avoidance of that penalty on a forfeiture of any right to appeal the sanction. By so doing, the Review Tribunal deprived Canales of a protected property interest without due process of law.

It is well-established that the "fundamental requisite of due process of law is the opportunity to be heard" at a meaningful time and in a meaningful manner. *Goldberg*, 397 U.S. at 267 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Applying that axiom, the Court "consistently has held that some

form of hearing is required before an individual is finally deprived of a property interest." *Eldridge*, 424 U.S. at 333 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931)). This "principle basic to our society" applies to any proceeding in which an individual is "condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction." *Joint Anti-Facist Comm.*, 341 U.S. at 168 (Frankfurter, J., concurring).

Fundamental principles of due process demand that there be no punishment for taking an appeal of an adverse decision. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (punishing individual for doing what the law plainly allows him to do is a due process violation "of the most basic sort"). The Texas rules governing judicial removal procedures specifically provide for an appeal to the state supreme court. *See* TEX. CONST., art. V, § 1-a (9); TEX. R. REM'L/RET. JUDG. 13. It would be an unprecedented breach of due process — a breach "of the most basic sort" — for a State to afford an individual a right to appeal, only to enhance punishment upon the exercise of that right.

It is an egregious abuse of the fundamental "fairness" guaranteed by the Due Process Clause to additionally punish someone for pursuing a right of appeal from an order of removal — the most severe sanction possible for an elected judge — in the face of a state constitutional right to retain his pension even if removed from office. This is an example of the unbridled power Texas Review Tribunals, in conjunction with the State Commission on Judicial Conduct, can exercise in the sanctioning of judges. The additional punishment is not what the Texas Constitution envisioned when it mandated a right of appeal to the Supreme Court of Texas; it is not what the Supreme Court of Texas contemplated when it set forth that constitutional

mandate in Rule 13 of the rules governing judicial removal. More importantly, it is not what the Fourteenth Amendment to the United States Constitution permits; it is, fundamentally, a deprivation of property without due process of law.

CONCLUSION

The petition for certiorari should be granted and the case reversed and remanded to the Supreme Court of Texas for consideration of the removal proceeding under due process dictates of a clear and convincing standard of proof and review.

Respectfully submitted,

SHARON E. CALLAWAY
Counsel of Record
MICHAEL J. MURRAY
CROFTS & CALLAWAY
A PROFESSIONAL CORPORATION
112 East Pecan Street, Suite 800
San Antonio, Texas 78205
(210) 299-0272

AUGUSTIN RIVERA, JR.
DUNN, WEATHERED, COFFEY,
RIVERA, KASPERITIS
& RODRIGUEZ, P.C.
611 S. Upper Broadway
Corpus Christi, Texas 78401
(361) 883-1594

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF REVIEW TRIBUNAL APPOINTED BY THE SUPREME COURT OF TEXAS DATED SEPTEMBER 4, 2003

REVIEW TRIBUNAL, APPOINTED BY THE SUPREME COURT

No. 84.

Sept. 4, 2003

OPINION

Chief Justice RICHARD BARAJAS, delivered the opinion of the Review Tribunal in which Justices DAY, O'NEILL, ROSS, NUCHIA, GUZMAN, and MARION, join.[1]

This is an appeal from the recommendation of the Texas State Commission on Judicial Conduct that Respondent, Terry A. Canales, be removed as Judge of the 79th Judicial District Court of the State of Texas, and further, that he be forever barred from holding judicial office in this State.[2] The Commission found

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1. The Review Tribunal was composed of Hon. Sam Day, Justice, Second District Court of Appeals, Fort Worth, designated Presiding Justice; Hon. Richard Barajas, Chief Justice, Eighth District Court of Appeals, El Paso; Hon. Michael O'Neill, Justice, Fifth Court of Appeals, Dallas; Hon. Donald Ross, Justice, Sixth Court of Appeals, Texarkana; Hon. Sam Nuchia, Justice, First Court of Appeals, Houston; Hon. Eva Guzman, Justice, Fourteenth Court of Appeals, Houston; Hon. Sandee Marion, Justice, Fourth Court of Appeals, San Antonio.

2. On November 6, 2002, the Supreme Court appointed a Review Tribunal to review the recommendation of the State (Cont'd)

that Respondent, while in his judicial capacity, and at times in his chambers, engaged in inappropriate, unsolicited, sexually suggestive conduct which included sexual assault and battery, i.e., forcefully kissing and fondling three young women. The women included his twenty-seven-year-old court secretary, an eighteen-year-old part-time employee with the Brooks County District Attorney's Office, and the twenty-one-year-old pregnant daughter of his court bailiff. Respondent has rejected the findings, conclusions, and recommendations of the Commission and in response, challenges the findings and ultimate recommendation that he be removed from office.

I. *SUMMARY OF THE EVIDENCE*

The State Commission on Judicial Conduct, in adopting its findings of fact, found that Judge Terry A. Canales relentlessly engaged in willful and persistent conduct clearly inconsistent with the proper performance of his duties, and further, that his willful and persistent conduct cast public discredit upon the judiciary or the administration of justice. The Commission found his action to be in violation of TEX. CONST. art. V, § 1-a(6)A of the Texas Constitution. As noted above, the Commission found that Respondent, while in his judicial capacity, and at times in his chambers, engaged in inappropriate, unsolicited, sexually suggestive conduct with three young women.[3]

(Cont'd)
Commission on Judicial Conduct that Respondent be removed from office and prohibited from holding judicial office in the future. The action was brought in accordance with Tex. Const. art. V, § 1-a (1993) and the Tex.R. Rem'l/Ret. Judges, 56 Tex.B.J. 823 (1993), promulgated by the Texas Supreme Court on May 22, 1992.

3. This Tribunal is not unmindful of the embarrassing nature of these allegations and the resulting effect that these allegations
(Cont'd)

Appendix A

The voluminous record in the instant case shows, and the Commission found, that on or about August 1996, Judge Terry A. Canales engaged in the inappropriate physical touching and kissing of "L.B.," his twenty-seven-year-old court secretary at the time. The unsolicited and unwelcome touching took place in Respondent's chambers located in Alice, Jim Wells County, Texas, during regular court hours. The record shows that "L.B." entered Respondent's chambers to conduct routine business and pick up signed notices. "L.B." testified that upon her entering the chambers, "he got up and walked around his desk and just grabbed me and started kissing me." "L.B." further testified that she did not consent to the grabbing and kissing, but rather pushed him away and immediately left the chambers.

The Texas State Commission on Judicial Conduct found that Respondent's actions in engaging in the inappropriate physical touching of "L.B.," while in his judicial chambers constituted willful or persistent conduct in violation of Article V, § 1-a(6) of the Texas Constitution,[4] and Canon 2A of the Texas Code of Judicial

(Cont'd)
may have on the victims involved. The embarrassment is amplified by the fact that the conduct is said to have occurred in a small, rural community. For that reason we address the young women as "L.B.," age 27, "R.H.," age 18, and "F.D.," age 21.

4. Article V, § 1-a(6)A of the Texas Constitution provides, in pertinent part, that any Justice or Judge of the courts established by the Constitution or created by the Legislature may be removed from office, disciplined, or censured for "incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice". Tex. Const. art. V, § 1-a(6)A (2003).

Conduct,[5] and thus, was willful conduct that was clearly inconsistent with the proper performance of his judicial duties and further served to cast public discredit upon the judiciary or the administration of justice.

The record further shows that on or about February 5, 2000, Respondent made an unsolicited telephone call to "R.H.," an eighteen-year-old part-time employee with the Brooks County District Attorney's office, during which time he made sexually suggestive comments. The record shows that "R.H." came to know Respondent during her employment. During the course of time, Respondent offered to find her full-time employment with his daughter's law firm. "R.H." testified that she never gave Respondent either her cellular phone number nor her home phone number, but that nonetheless, he acquired her telephone numbers and began calling her. She testified that Respondent would make late night calls to both her cell and home phones which had no substantive content, something she found discomforting. On the occasion at hand, Respondent made a morning call to "R.H." while she was getting ready to go to school. She testified that she told him she was going to take a shower and he responded in a sexually suggestive manner. "R.H." testified that:

> [he wanted me] to think about him in the shower while I'm in the shower rubbing myself. To think about him touching me.

According to "R.H.," this was his last call and no contact was made until the following month in March within his chambers.

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5. Canon 2A of the Texas Code of Judicial Conduct provides, "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity of the judiciary". TEX.CODE JUD. CONDUCT, canon 2A (2003).

Appendix A

The record shows that on or about March 20, 2000, during regular court hours, Respondent engaged in inappropriate non-consensual physical touching of "R.H." while the two were meeting in his chambers in Falfurrias, Brooks County, Texas. "R.H." testified that she was visiting the judge's secretary, Sandra Barrera, and Barrera asked "R.H." to "grab the Judge a soda." Barrera's phone then rang, so "R.H." handed the soda to Respondent in his chambers. As "R.H." was walking toward Respondent to deliver the soda, Respondent walked towards the door and shut it, making it difficult for her to leave. "R.H." further testified that Respondent told her about a county commissioner who was considering making her job with the District Attorney's Office full-time, rather than part-time, with benefits. According to "R.H.," she stated that she "better go" and the conversation shifted to Respondent asking for a hug. Believing Respondent was joking, she said, "No." "R.H." testified that Respondent stated, "No, come on, give me a hug." "R.H." kept saying "no" and he kept asking. "R.H." stated that she finally "just put my arms out to let him hug me." According to "R.H.," she agreed to give him a hug hoping she would then be able to leave. "R.H." testified that while she did agree to hug Respondent, she did not consent to being fondled and related Respondent's actions as follows:

> [h]e hugged me underneath my arms. And he touched my butt, put his hands on my butt and tried lifting my dress. I was wiggling and holding my hands up at his chest and—[sic] just keep him away.

"R.H." testified that soon after, Respondent asked her to sit down on his couch to continue their discussion. She sat down at which

time Respondent put his hand inside her sleeveless dress and pulled out her bra strap. "R.H." testified that:

> And he said, 'Oh, I like black.' And then he put his hand on my knee and tried lifting my dress and said, 'Now let's see if these are matching.'

Finally, "R.H." testified that she stood up and pulled her dress down and walked towards the door, but that Respondent put one hand on the door, the other hand around her waist, pushed himself against her, moaned as he kissed her ear and cheek, and would not otherwise release her. "R.H." believed that she was able to leave the judge's chambers when Respondent heard people approaching.

The Texas State Commission on Judicial Conduct found that Respondent's actions on February 5, 2000, in making sexually suggestive comments to "R.H." during an unsolicited telephone conversation, and his actions of March 28, 2000, in engaging in the inappropriate physical touching of "R.H.," while in his judicial chambers constituted willful or persistent conduct in violation of Article V, § 1-a(6) of the Texas Constitution, and Canon 2A of the Texas Code of Judicial Conduct, and thus, was willful conduct that was clearly inconsistent with the proper performance of his judicial duties and further served to cast public discredit upon the judiciary or the administration of justice.

Finally, the record shows that on or about April 20, 2000, Respondent, during regular court hours and at a meeting in his chambers, engaged in making sexually suggestive comments to "F.D.," the twenty-one-year-old pregnant daughter of his court

bailiff,[6] and further at that same time and place, engaged in the inappropriate nonconsensual physical touching of "F.D."

"F.D." testified that she was introduced to Respondent by her father Juan Delgado, his court bailiff, when she was nine years old, and that she had maintained an amicable relationship with Respondent and his family. Respondent had extended his relationship with "F.D." by securing her employment in both his office and at the juvenile probation office. In addition, on one occasion, he paid one semester of her college tuition. "F.D." stated that in April 2000 she was unemployed and went to visit Respondent at the courthouse in reference to finding a job. She further told Respondent about her pregnancy and her boyfriend. According to "F.D.," Respondent agreed to help, and asked her to return in a week. She stated that she returned a week later, as directed, and met with Respondent in his chambers where he received her with a cordial greeting, asked her to sit down, and sat next to her on his couch. "F.D." testified that she and Respondent conversed about her pregnancy, all the while he had his eyes fixated on her breasts which made her feel uncomfortable. She further testified that she struggled with arranging her dress, while Respondent shifted the conversation by commenting on her physical appearance. In describing the moment, "F.D." stated:

> And he asked me, 'Are you insecure?' And I said, 'No I'm not.' And he said, 'Well you shouldn't be. You've grown up into a very beautiful young lady,' as he was looking at my breast.

She stated that she then lied to him about having to leave.

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6. The record shows that the court bailiff was an eleven year employee in Respondent's chambers.

"F.D." testified that as she was leaving, Respondent asked her for a hug and put his arms around her. She stated that he put his lips on her neck, was breathing hard, and hugged her for over a minute. He asked for another hug and tried to kiss her. "F.D." said she turned her face away, but that he put his hands on her behind, pressed his body against her, and started moaning while she was able to feel his erection. She testified that:

> He started moaning and just making noises or whatever, and he said, 'This feels good, doesn't it?' And I just told him, 'You know what? Just let me go. I really need to go.'

"F.D." testified that Respondent let her go, and as she stepped back he caught sight of a bruise on her chest, pointed it out, touched it, and then put his hand on her dress, touching her breasts. She took a step back, opened the door, and walked out. Finally, she stated that as she was leaving, Respondent asked her to return later to check on her job prospects.

The Texas State Commission on Judicial Conduct found that Respondent's actions on April 20, 2000, in engaging in the inappropriate physical touching of "F.D.," while in his judicial chambers, constituted willful or persistent conduct in violation of Article V, § 1-a(6)A of the Texas Constitution, and Canon 2A of the Texas Code of Judicial Conduct, and thus, was willful conduct that was clearly inconsistent with the proper performance of his judicial duties and further served to cast public discredit upon the judiciary or the administration of justice.

Appendix A

II. *DISCUSSION*

Respondent advances eleven reasons why this Review Tribunal should reverse the findings of the State Commission on Judicial Conduct, and reject the Commission's recommendation that he be removed and forever barred from holding judicial office. In Issues No. One through No. Four, and Issue No. Eight, he collectively complains of various procedural issues to include statute of limitations, improper joinder, defect in pleadings, application of the improper legal standard, and the denial of discovery. In Issues No. Five through No. Seven, he contends that the evidence is both legally and factually insufficient to support the Commission's findings. In Issues No. Nine and No. Ten, Respondent asserts that the sanction of removal and permanent bar from holding judicial office in the future is excessive. Finally, in Issue No. Eleven, Respondent asserts that his rights under both the United States Constitution and the Texas Constitution were violated in various respects.

A. Procedural Standards

Judicial conduct proceedings brought in accordance with the constitution of the State of Texas and established rules for the removal or retirement of judges are neither criminal nor regulatory, but rather are civil in nature. Their defined purpose is not necessarily to punish, but to maintain, if not enhance, the honor and dignity of the judiciary of the entire State of Texas and to uphold the administration of justice for the benefit of all its citizens. *In re Barr,* 13 S.W.3d 525, 533 (Tex.Rev.Trib.1998); *see also In re Thoma,* 873 S.W.2d 477, 484-85 (Tex.Rev.Trib.1994) and *In re Lowery,* 999 S.W.2d 639, 648 (Tex.Rev.Trib.1998).

Appendix A

Judicial removal proceedings instituted under TEX. CONST. art. V, § 1-a continue to be a statistical rarity. Insofar as the procedural nature of the fact finding in the instant case departs significantly from that seen in prior judicial removal proceedings, a discussion of the procedural aspects is essential to a full and complete understanding of the action below.

The rules provide that once the Commission has moved for formal proceedings, as in this case, the Respondent judge is to be served with Notice of Formal Proceedings and a verified answer is to be filed by the judge, with the Commission, within 15 days from the date of such service. TEX.R. REM'L/RET. JUDGES, 56 Tex. B.J. 823 (1993), Rule 10(a)(b). In the instant case, Respondent was served with Notice of Formal Proceedings on November 28, 2001, and he timely answered.[7] Under the rules, the Commission is to set a time and place for its formal hearing, before *it* or before a special master, giving notice to the judge at least 20 days prior to the scheduled date of the formal hearing. *Id.,* Rule 10(c)(1) (emphasis supplied). If the Commission directs that the hearing shall be before a special master, it shall make a written request to the Supreme Court to appoint such a special master who is to be appointed within 10 days from such a request. *Id.* Rule 10(c)(2). In the instant case, the Commission elected to hold the formal hearing itself. We note that the rules allow, but do not specifically contemplate formal hearings before the Commission, since the language of the rules relating to formal hearings make exclusive reference to a special master. Nonetheless, in treating the Commission as the fact finder, the

7. The record shows that the Commission amended its original Notice of Formal Proceedings on the May 28, 2002 and issued a second amended Notice of Formal Proceedings on June 27, 2002.

rules contemplate the Commission will furnish itself [sic] and the Respondent judge its findings and recommendation.[8] *Id.* Rule 10(h)(1).

Objections, if any, to the report of the Commission are due within 15 days with additional hearings, if any, to be held on 10 days' notice. TEX.R. REM'L/RET. JUDGES, Rule 10(i) and (j). Subsequent to the conclusion of all hearings, the Commission renders its decision to dismiss the complaint, publicly censure the judge, or recommends the removal or the retirement of the judge. *Id.,* Rule 10(m). Upon making a determination to recommend the removal or retirement of a judge, the Commission is to request the Chief Justice of The Texas Supreme Court to appoint a review tribunal, composed of seven justices, selected

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8. It is at this juncture that the Commission departed from established procedure in removal proceedings. The rules for removal or retirement of judges contemplates that the Commission may conduct its formal hearing, before itself or before a special master. In the instant case the Commission elected not to have a special master, who would have functioned as a trial judge and fact finder. Instead, the Commission, by order dated March 8, 2002, elected to have the formal hearing before itself. This presents the obvious problem of what to call the fact finder in the instant case, as opposed to "The Commission." The Commission consists of eleven members. In this case, a quorum of the Commission, consisting of a presiding officer and five members, sat as the "Commission" and heard testimony and made findings and recommendations back to the Commission. *See* TEX.R. REM'L/RET. JUDGES, Rule, Rules 10(c)(1) and (c)(2). We find the procedure followed in this regard awkward at best, and may certainly mislead members of the Texas judiciary that disciplinary proceedings may be less than fair and impartial. We strongly recommend the use of an appointed special master as a fact finder, rather than the Commission itself.

by lot from the courts of appeals of our state. *Id.*, Rules 1(h); 11; 12(a). A judge may appeal a decision of the review tribunal to the Texas Supreme Court under the substantial evidence rule. *Id.*, Rule 13.

Judge Terry A. Canales was served with Notice of Formal Proceedings on November 28, 2001. The Commission amended its original Notice of Formal Proceedings on the May 28, 2002 and issued a second amended Notice of Formal Proceedings on June 27, 2002. A formal hearing on the merits was held on the August 5, 2002. The Commission, after considering the evidence and the arguments of special counsel, found that "it" proved by a preponderance of the evidence, the existence of judicial misconduct through inappropriate physical touching and making sexually suggestive comments, as set forth in the Second Amended Notice of Formal Proceedings. After notification of the Commission's Findings of Fact on August 27, 2002, Respondent was granted additional time to file a Statement of Objections to those findings. The Statement of Objections was received by the Clerk of the Commission on September 26, 2002. On September 26, 2002, Respondent received Notice on Hearing Objections, set for October 11, 2002. On October 11, 2002, the State Commission on Judicial Conduct heard oral argument on Respondent's Statement of Objections to the Commission Findings of Fact and further considered the record of the Formal Proceedings involving Respondent. On August 27, 2002, the full Commission accepted the Findings of Fact filed by a six-member panel of the Commission itself, and further voted, by a required affirmative vote of more than six of its members, to request that the Supreme Court of Texas appoint a Review Tribunal. Among its findings, the Commission recommended that Respondent be removed from office and that

the Review Tribunal issue an order prohibiting Respondent from holding judicial office in the future. The record in this case shows that the full Commission overruled Respondent's Objections to the Findings of Fact filed with the Commission on September 26, 2002. The appeal of this extraordinary process follows.

The burden was upon the Examiner for the State Commission on Judicial Conduct to establish, before a six-member sub-panel of itself, acting as a fact finder, those allegations against Respondent by the preponderance of the evidence, as applied in civil cases. *Barr,* 13 S.W.3d at 533; *Thoma,* 873 S.W.2d at 485; *Lowery,* 999 S.W.2d at 648; *see also In re Brown,* 512 S.W.2d 317, 319-20 (Tex.1974). To the extent that they do not conflict with the RULES FOR REMOVAL OR RETIREMENT OF JUDGES, the civil rules of procedure, both trial and appellate, are applicable. TEX.R. REM'L/RET. JUDGES, 56 Tex. B.J. 823 (1993), Rules 10(d), 12(e) and (g). Moreover, during the course of any hearing conducted in the furtherance of formal proceedings only legal evidence is to be received.[9] *Barr,* 13 S.W.3d at 533; *Thoma,* 873 S.W.2d at 485; TEX.R. REM'L/RET. JUDGES, Rule 10(e). The findings of the sub-panel of the Commission, acting as a fact finder, as adopted by the full Commission, are tantamount to findings of fact filed by a trial judge in a trial without a jury, and as a result, we review such findings in that light. *In re Barr,* 13 S.W.3d at 533; *In re Thoma,* 873 S.W.2d at 485; *In re Lowery,* 999 S.W.2d at 648.

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9. In addition to the requirement that only legal evidence be received, timely objections, as well as other requirements for the proper preservation of error for review, are required.

Appendix A

B. Issues Presented for Review

1. Procedural Complaints

In Issue No. Three, Respondent argues that the Commission's findings with regard to "L.B.'s" complaint are unsupported by any live pleadings and are therefore void as a matter of law. The Commission amended its Notice of Formal Proceedings to include "L.B.'s" allegations on May 28, 2002. In its initial Findings of Fact issued on August 27, 2002, the Commission found that the Examiner had proven by a preponderance of the evidence that "[i]n or around August 1995, during regular business hours, Respondent engaged in the inappropriate physical touching and kissing of ["L.B."], his secretary, while in his chambers located in Alice, Jim Wells County, Texas." Respondent filed his Statement of Objections on September 25, 2002, in which he pointed out that there was no evidence in the record that alleged any misconduct "in or around August 1995." Thereafter, the Commission amended its Findings of Fact with regard to "L.B.'s" complaint to read, "In or around August 1996. . . ." Respondent now complains that the amended finding is unsupported by the live pleading on which the Examiner proceeded to trial.

The function of a pleading is to define the issues at trial. *See Safety Cas. Co. v. Wright,* 138 Tex. 492, 160 S.W.2d 238, 245 (1942) (op. on reh'g); *Bader v. Cox,* 701 S.W.2d 677, 686 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). A petition must give fair and adequate notice of the facts upon which the pleader bases his claim so that the opposing party has information sufficient to enable him to prepare a defense. *See Roark v. Allen,* 633 S.W.2d 804, 810 (Tex.1982); *see also* Tex.R. Civ. P. 45,

47. The pleadings and the evidence must coincide. *Wright,* 160 S.W.2d at 245. However, a variance between the pleadings and proof is fatal only if the divergence is substantial, misleading, and prejudicial. *See Stone v. Lawyers Title Ins. Corp.,* 554 S.W.2d 183, 186-87 (Tex.1977); *see also* 2 McDonald Texas Civil Practice § 7.32 [b] (rev. 1992).

The term "on or about" means a date of approximate certainty, with a possible variance of a few days. *See Grand Prairie Indep. Sch. Dist. v. Vaughan,* 792 S.W.2d 944, 945 (Tex.1990) (citing BLACK'S LAW DICTIONARY 564 (5th ed. 1979); *State v. Metzger,* 199 Neb. 186, 256 N.W.2d 691, 692 (1977)). Here, the variance was twelve months, which is a substantial difference. Upon Respondent's objection, the Commission should have not only amended its Findings, but should have also amended the formal notice, or moved for a trial amendment to the pleadings, to conform with the evidence presented as allowed by Rule 10(f). TEX.R. REM'L/RET. JUDGES, Rule 10(f).

Accordingly, Issue No. Three is sustained. Given our disposition of Issue No. Three, we need not address Issues No. One, Two[10] and Five.

In Issue No. Four, Respondent maintains that the Commission used an improper legal standard in arriving at its

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10. In Issue No. Two, Respondent asserts that the "L.B." and "T.C.M." complaints were improperly, untimely, and unfairly joined two months prior to trial. We note that the Commission did not sustain the allegations with regard to T.C.M. so we find no harm in the joining of T.C.M.'s complaints and need not address Issue No. Two.

Findings, Conclusions and Recommendations. Respondent argues that the proper legal standard to be used in removal proceedings is the higher "clear and convincing" standard of proof following the Texas Supreme Court's decision in *In re Laughlin,* 153 Tex. 183, 265 S.W.2d 805, 809 (1954). Respondent further points out that the holding in *Laughlin* has never been expressly overturned, but rather, that it has simply been overlooked by the subsequent removal proceedings. Respondent contends that perhaps a preponderance standard is appropriate in judicial disciplinary proceedings where the sanction imposed is less than removal. Respondent notes that the *In re Brown,* 512 S.W.2d 317 (Tex.1974) was the first removal proceeding instituted under the amended Section 1-a of Article V of the Texas Constitution.

We are unconvinced by Respondent's argument. *In re Laughlin* has not simply been overlooked by the subsequent removal proceedings. Respondent himself pointed out that there was an amendment to the pertinent section of the Texas Constitution and that *In re Brown* was the first removal proceeding instituted under such amendments. It is therefore not a simple oversight on the part of the Supreme Court, or Review Tribunals, to have applied *In re Brown* as precedence to support the legal standard to be used in these proceedings. In this case the Court determined that "the burden to establish the charges against Judge Brown was upon the Examiner, and those charges had to be established by a preponderance of the evidence." *In re Brown,* 512 S.W.2d at 319-20. Similarly, *In re Thoma,* the first proceeding to be reviewed by a Review Tribunal, established that the legal standard to be used in these proceedings is a "preponderance of the evidence." 873 S.W.2d 477, 485 (Tex.Rev.Trib.1994) (citing *In re Brown,* 512 S.W.2d at 319-20). Subsequently, *In re Barr* and *In re Lowery,* both agreed

with the *Brown* and *Thoma* decisions making the legal standard for review a "preponderance of the evidence." *See In re Barr,* 13 S.W.3d at 525; *In re Lowery,* 999 S.W.2d 639 (Tex.Rev.Trib.1998).

It is well settled law in the State that the legal standard for removal proceedings is a "preponderance of the evidence" standard rather than a "clear and convincing evidence" standard as Respondent argues. We agree with Respondent that removing a member of the judiciary and depriving the electorate of its choice of judge is a serious matter and it is for this reason that uniformity in the standard used should be preserved so as to not send mixed signals to subsequent proceedings. For the reasons set forth above, we find that the proper legal standard was used by the Examiner. Accordingly, Issue No. Four is overruled.

In Issue No. Eight, Respondent asserts that he was unfairly denied discovery of potentially exculpatory telephone records, medical records, and information regarding pertinent conversations between complainants and witnesses. Respondent cites no authority as to how the court abused its discretion in overruling the motion to compel discovery of the telephone records. *See* Tex.R.App. P. 38.1(h); *Leyva v. Leyva,* 960 S.W.2d 732, 734 (Tex.App.-El Paso 1997, no writ) (failure to cite authority in support of point of error waives complaint). We note that while "R.H." was ordered to produce various records at trial, she claimed that she could not locate any of the requested records. Nonetheless, Respondent acknowledges that at no time did he seek to subpoena the records in question.

Furthermore, Respondent cites no authority to support his contention that "R.H.'s" medical records were "clearly relevant

and discoverable." Respondent wholly failed to make an offer of proof. Preservation of a complaint is a prerequisite for appellate review. Tex.R.App. P. 33.1(a). Error may be predicated on a ruling that excludes a party's evidence only if the substance of the evidence was made known to the court by offer. Tex.R. Evid. 103; *Ludlow v. DeBerry,* 959 S.W.2d 265, 269-70 (Tex.App.-Houston [14th Dist.] 1997, no writ). The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. Goode, Wellborn & Sharlot, Guide to the Texas Rules of Evidence, § 103.3 at 21 (2nd ed. 1993). A secondary purpose is to permit the trial judge, or in this case the Commission, to reconsider his ruling in light of the actual evidence. *Id.* An offer of proof is sufficient if it apprises the court of the substance of the testimony and may be presented in the form of a concise statement. *Chance v. Chance,* 911 S.W.2d 40, 51-52 (Tex.App.-Beaumont 1995, writ denied). Excluded evidence also may be preserved for appellate review by a post-trial bill of exception. Tex.R.App. P. 33.2. Respondent never stated the relevance of the records he sought, failed to make an offer of proof, and failed to cite any authority to support his argument. Respondent has waived his complaint with regard to "R.H.'s" medical records. Accordingly, Respondent's Issue No. Eight is overruled in its entirety.

2. Sufficiency of the Evidence to Establish "Willful" Violations

The record in the instant case includes an extensive reporter's record. Consequently, the Commission's adopted findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the

legal and factual sufficiency of the evidence supporting findings in a civil case, either by a trial court or by a jury. *In re Barr,* 13 S.W.3d at 533; *In re Lowery,* 999 S.W.2d at 648; *In re Thoma,* 873 S.W.2d at 485.

A factual insufficiency point requires us to examine all of the evidence in determining whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re Barr,* 13 S.W.3d at 533; *In re Thoma,* 873 S.W.2d at 485 (citing generally *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (Tex.1951)). As in appeals of civil matters, this Review Tribunal cannot substitute its findings for those of the Commission. If there is sufficient competent evidence of probative force to support the findings and recommendation, they must be sustained. *In re Barr,* 13 S.W.3d at 533-34; *In re Thoma,* 873 S.W.2d at 485 (citing *Oechsner v. Ameritrust Texas, N.A.,* 840 S.W.2d 131, 136 (Tex.App.-El Paso 1992, writ denied)). It is not within the province of this Review Tribunal to interfere with the Commission's resolution of conflicts in the evidence or to pass on the weight or credibility of the witnesses' testimony. *In re Barr,* 13 S.W.3d at 534; *In re Thoma,* 873 S.W.2d at 485 (citing *Benoit v. Wilson,* 150 Tex. 273, 239 S.W.2d 792 (Tex.1951)). Where there is conflicting evidence, the findings of the Commission on such matters will be regarded as conclusive. *In re Barr,* 13 S.W.3d at 534; *In re Thoma,* 873 S.W.2d at 485 (citing *Montgomery Ward & Co. v. Scharrenbeck,* 146 Tex. 153, 204 S.W.2d 508 (1947); *Oechsner,* 840 S.W.2d at 136)).

In considering a "no evidence" legal insufficiency point, we consider only the evidence that tends to support the Commission's findings and disregard all evidence and inferences to the contrary.

In re Barr, 13 S.W.3d at 534; *In re Thoma,* 873 S.W.2d at 485 (citing *Garza v. Alviar,* 395 S.W.2d 821 (Tex.1965)). If there is more than a scintilla of evidence to support the questioned finding, the legal sufficiency point fails. *In re Barr,* 13 S.W.3d at 534; *In re Thoma,* 873 S.W.2d at 485-86 (citing *Worsham Steel Co. v. Arias,* 831 S.W.2d 81 (Tex.App.-El Paso 1992, no writ)).[11]

In Issue No. Six, Respondent challenges the legal and factual sufficiency of the evidence to support the Commission's findings with regard to the "F.D." complaint. Respondent contends that one of the "F.D." findings and the Examiner's live evidence are at variance with the evidence at trial. According to Respondent, "F.D." testified that the alleged incident occurred on April 26, 2000, while the findings of the Commission state that the alleged incident took place on April 20, 2000. He contends that there is absolutely no evidence that any misconduct took place on April 20, 2000 and that the finding of the Commission is not supported by any evidence. The finding of the Commission states as follows:

> 5. On or about April 20, 2000, during the regular business hours, Judge Canales engaged in the inappropriate nonconsensual physical touching of ["F.D."] while the two were meeting in his chambers

11. Respondent, citing no authority, persuasive or otherwise, suggests that this Review Tribunal should abandon the recognized standards of review of legal and factual sufficiency of the evidence and instead adopt a "just and proper" standard in determining the merits of the Respondent's removal from office. We decline Respondent's invitation to adopt such a vague and cloudy standard, instead electing to hold Texas jurists to a higher, more clearly defined, uniform standard.

> located at the courthouse in Alice, Jim Wells County, Texas.
>
> 6. On or about April 20, 2000, during the meeting in his chambers, Judge Canales made sexually suggestive comments to ["F.D."].

The findings of the Commission were not specifically stated to date April 20, 2000 as Respondent contends. The language "on or about" suggests that the findings occurred in some date near to April 20, 2000. "F.D.'s" testimony suggests that the alleged incident took place on or about April 20, 2000, namely April 26, 2000. We find there to be more than a scintilla of evidence to support the Findings of the Commission.

Respondent also contends that the evidence suggests "F.D.'s" complaint was motivated by revenge rather than the truth. Specifically, Respondent argues that "F.D." sought revenge for her father being terminated from his job as a custodian at a building owned by Respondent. Respondent suggests that the testimony of "F.D.'s" former boyfriend and his mother, that "F.D." made up the complaint to "get back" at Respondent after her father was terminated from his job, supports this contention. Respondent contends that in an audio-taped telephone message from "F.D." to her former boyfriend, she threatened the former boyfriend for testifying and that more than once she alluded that she was not going to "get any money." Respondent further contends that the one aspect of "F.D.'s" complaint which she could have corroborated with documentary evidence, was disproved by the same evidence: the allegations of her condition at the hospital.

Appendix A

We are unconvinced by Respondent's arguments. The testimony of "F.D.'s" former boyfriend and his mother was also contested. Respondent presented the audiotape as Exhibit 111. On the tape, "F.D." told her former boyfriend that she did not know why he was lying and that she did not know what it was that Respondent would give him in return. Also in the message, "F.D." stated that at worst she would not get any money, but that Respondent would still get "what he deserves because of the other allegations." There is nothing in this audiotape that suggests that money was the sole purpose of her complaint. Similarly, the only evidence that suggests "F.D.'s" complaint was motivated by revenge is the testimony of her former boyfriend and his mother. Respondent suggests that this evidence disproves "F.D.'s" condition prior and at the time she was at the hospital. We disagree. In the medical report introduced as Exhibit 49, there is a suggestion that there was vaginal bleeding that evening and that the blood was taken to do an analysis. Also, "F.D.'s" emotional state at the time of the hospital visit does not suggest her emotional state prior to her going to the emergency room. In reviewing only the evidence that tends to support the finding of the Commission and disregarding all evidence to the contrary, we find more than a scintilla of evidence to support the findings of the Commission with regards to "F.D.'s" complaint. Similarly, having reviewed the record in its entirety to determine whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust, we find that there is factually sufficient evidence to support the findings of the Commission with regard to "F.D.'s" complaint. For the reasons set forth above, we overrule Issue No. Six in its entirety.

In Issue No. Seven, Respondent challenges the legal and factual sufficiency of the evidence to support the Commission's

findings with regard to the "R.H." complaint. The record shows that "R.H." came to know Respondent during her employment with the Brooks County District Attorney's office. During the course of time, Respondent offered to find her full-time employment with his daughter's law firm. "R.H." testified that she never gave Respondent either her cellular phone number nor her home phone number, but that nonetheless, he acquired her telephone numbers and began calling her. She testified that Respondent would make late night calls to both her cell and home phones which were of no substantive matter, something she found discomforting. The record shows that on or about February 5, 2000, Respondent made an unsolicited telephone call to "R.H.," during which time he made sexually suggestive comments. On the occasion at hand, Respondent made a morning call to "R.H." while she was getting ready to go to school. She testified that she told him she was going to take a shower and he responded in a sexually suggestive manner. "R.H." testified that:

> [he wanted me] to think about him in the shower while I'm in the shower rubbing myself. To think about him touching me.

According to "R.H.," this was his last call and no contact was made until the following month in March within his chambers.

The record shows that on or about March 20, 2000, during regular court hours, Respondent engaged in inappropriate non-consensual physical touching of "R.H." while the two were meeting in his chambers in Falfurrias, Brooks County, Texas. "R.H." testified that she was visiting the judge's secretary, Sandra Barrera, and Barrera asked "R.H." to "grab the Judge a soda." Barrera's phone then rang, so "R.H." handed the soda to

Respondent in his chambers. As "R.H." was walking toward Respondent to deliver the soda, Respondent walked towards the door and shut it, making it difficult for her to leave. "R.H." further testified that Respondent told her about a county commissioner who was considering making her job with the District Attorney's Office full-time, rather than part-time, with benefits. According to "R.H," she stated that she "better go" and the conversation shifted to Respondent asking for a hug. Believing Respondent was joking, she said, "No." "R.H." testified that Respondent stated, "No, come on, give me a hug." "R.H." kept saying "no" and he kept asking. "R.H." stated that she finally "just put my arms out to let him hug me." According to "R.H.," she agreed to give him a hug hoping she would then be able to leave. "R.H." testified that while she did agree to hug Respondent, she did not consent to being fondled and related Respondent' actions as follows:

> [h]e hugged me underneath my arms. And he touched my butt, put his hands on my butt and tried lifting my dress. I was wiggling holding my hands up at his chest and—[sic] just keep him away.

"R.H." testified that soon after, Respondent asked her to sit down on his couch to continue their discussion. She told him that she "better get going," but Respondent insisted that she sit down. Respondent then put his hand inside her sleeveless dress and pulled out her bra strap. "R.H." testified that:

> And he said, 'Oh, I like black.' And then he put his hand on my knee and tried lifting my dress and said, 'Now let's see if these are matching.'

Finally, "R.H." testified that she stood up and pulled her dress down and walked towards the door, but that Respondent put one hand on the door, the other hand around her waist, pushed himself against her, moaned as he kissed her ear and cheek, and would not otherwise release her. "R.H." believed that she was able to leave the judge's chambers when Respondent heard people approaching.

In reviewing only the evidence that tends to support the Commission's findings and disregarding all evidence to the contrary, we find more than a scintilla of evidence to support the findings of the Commission with regards to "R.H.'s" complaint. Similarly, having reviewed the record in its entirety to determine whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust, we find that there is factually sufficient evidence to support the findings of the Commission with regard to "R.H.'s" complaint. For the reasons set forth above, we overrule Issue No. Seven in its entirety.

3. Constitutional Complaint

In Issue No. Eleven, Respondent argues, without the benefit of any citation or references to the record, that his rights under the U.S. and Texas Constitutions were violated as a result of the manner in which the proceedings were conducted, the standards and procedures applied, the conclusions drawn, and the recommendations made. We note that despite the serious nature of the consequences of this proceeding, Respondent has wholly failed to cite *any* authority to support his contention that his constitutional rights were violated. *See* Tex.R.App. P. 38.1(h); *Leyva v. Leyva,* 960 S.W.2d 732, 734 (Tex.App.-El Paso 1997,

no writ) (failure to cite authority in support of point of error waives complaint). Moreover, Respondent does not even provide *any* analysis of this issue. To the contrary, a conclusory statement is made that Respondent's rights were violated. We find that as in the case of appeals in civil cases, complaints in cases brought pursuant to the Rules for the Removal or Retirement of Judges, failure to advance legal analysis, legal citations, and appropriate references to the record will serve as the foundation for waiver of such complaints on appeal. Accordingly, this complaint is waived, and we will not address it. *See Fredonia State Bank v. Gen. Am. Life Ins. Co.,* 881 S.W.2d 279, 284 (Tex.1994) (citing long-standing rule that a point may be waived due to inadequate briefing). Respondent's Issue No. Eleven is overruled.

4. Issues on the Propriety of the Sanction Assessed

In Issues No. Nine and No. Ten, Respondent suggests that the Commission's recommendation of removal and permanent bar from holding office is excessive. We examine that in light of our sustaining Issue No. Three, and not having to address Issues No. One, No. Two, and No. Five which are collateral.

The Texas Judicial Conduct Commission is authorized to perform three fundamental tasks: (1) to investigate claims of misconduct and to bring and pursue formal or informal charges; (2) to hold an adjudicative hearing and make findings of fact; and (3) to recommend or order a final disposition to those charges. *See generally* Tex. Const. art. V, § 1-a (1993); *see also* Jeffrey M. Shaman et al., Judicial Conduct and Ethics, § 13.03 (3d ed. 2000). The investigations and deliberations of the Texas Judicial Conduct Commission may result in: (1) dismissal of the complaint; (2) public or private order of additional

education in combination with a public or private sanction; (3) public or private admonition, warning or reprimand; (4) the acceptance of a voluntary agreement to resign from judicial office in lieu of disciplinary action, or (5) formal proceedings for the removal or the involuntary retirement of the judge from the bench. Tex. Const. art. V, § 1-a(8).

In the instant case, the Commission, after the hearing and upon considering the record and reports filed, found good cause to recommend to this review tribunal that Respondent should be removed from office and forever barred from holding judicial office.[12] The recommended sanction is the most severe consequence for judicial misconduct provided for in the Texas Constitution. The severity of contesting the recommendation of removal from office is illustrated by the fact that if the order of removal is sustained, the offending judge forfeits all of her or his retirement annuity.[13] Tex. Gov't Code Ann. § 834.004 (Vernon's 2003); *see also* Tex. Gov't Code Ann. § 839.003. Respondent has chosen to contest the recommendation of removal.

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12. Inherent in the duties and responsibilities of the Commission is the obligation to conduct a fully and complete investigation, and upon conclusion of such investigation, explore all authorized avenues of disposition, including all lesser sanctions. TEX.R. REM'L/RET. JUDGES, Rule 10(m).

13. Tex. Gov't Code Ann. § § 834.004 and 839.003 in identical language, provide as follows:

> An annuity that is based on service of a member who is removed from judicial office by impeachment, or otherwise for official misconduct, may not be paid under this subtitle.

Appendix A

Upon a finding of judicial misconduct, the imposition of sanctions must necessarily be decided on a case-by-case basis. In determining whether a recommended sanction is excessive or otherwise appropriate, a review tribunal must remain mindful that the primary purpose of the Texas Code of Judicial Conduct, and all its ancillary rules, is to protect the citizens of Texas, rather than to discipline judges. In an era of increasing partisanship, legislative bickering, and social turmoil, it is the judiciary that is most often called upon to resolve differences, and lend order and calm. The Texas judiciary must be the guidon of the banner representing stability, impartiality, and fairness in our State. Consequently, we emphasize that the standard for judicial conduct in the State of Texas must be more than effortless obedience to the law, but rather, must be conduct which constantly reaffirms one's fitness for the high responsibilities of judicial office and which continuously maintains, if not furthers, the belief that an independent judiciary exists to protect the citizen from both government overreaching and individual self-help. *See generally In re Barr,* 13 S.W.3d at 532.

In the instant case, we are not faced with a *single* instance of sexual impropriety by a member of the Texas judiciary, acting in his individual capacity, in the privacy of his home. Rather, we find Respondent, who in his judicial capacity, and in his judicial chambers, engaged in the inappropriate, unsolicited, sexually suggestive conduct which included sexual advances by forcibly kissing and fondling two young women. The women included an eighteen-year-old part-time employee with the Brooks County District Attorney's Office, and the twenty-one-year-old pregnant daughter of his court bailiff.[14]

14. We note once again that we examine the sanctions levied against Respondent on the basis of his conduct involving two young (Cont'd)

Appendix A

Integrity is the very essence of the judicial vocation. Respondent has brought the judiciary into disrepute and has violated the trust of the people who placed him in office. Respondent's actions damaged public confidence in the integrity of the judiciary. In the instant case, it is not merely a question of whether Respondent accepted the responsibility of becoming familiar with and complying with the Code of Judicial Conduct and of upholding the integrity of the judiciary, but rather, whether he knew right from wrong. In any society, the unwelcome sexual advances of one in authority over another is wrong. The actions of a judicial officer in pursuing such advances, in chambers, as to another individual regardless of whether the victim is a public servant or the pregnant daughter of the court bailiff, is to be condemned.

Given the facts and circumstances detailed above, we find that the recommendation of removal from office is appropriate to protect the citizens of Texas and certainly is not excessive. Further, we likewise find the recommendation that he be prohibited from holding judicial office in the future not to be excessive. Issue Nos. Nine and Ten are overruled in their entirety.

Having sustained Issue No. Three, and not having to address Issue Nos. One, Two and Five, and further having overruled each of Respondent's remaining issues on review, we affirm the recommendation of the State Commission on Judicial Conduct

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(Cont'd)

women. We have sustained Respondent's Issue No. Three and its ancillary points on procedural grounds. Issue No. Three alleged similar sexual misconduct said to have occurred in August 1995. The record does establish ample, unobjected to evidence of sexual misconduct having taken place in August 1996.

that Respondent be sanctioned. We accept the recommendation that Respondent, Terry A. Canales be removed as Judge of the 79th Judicial District Court of the State of Texas, and further accept the recommendation that he be forever barred from holding judicial office in the State of Texas.

TERRY A. CANALES IS HEREBY REMOVED AS JUDGE OF THE 79TH JUDICIAL DISTRICT COURT OF THE STATE OF TEXAS AND IS FOREVER BARRED FROM HOLDING JUDICIAL OFFICE IN THE STATE OF TEXAS.

APPENDIX B — COMMISSION'S FINDINGS, CONCLUSIONS AND RECOMMENDATIONS BEFORE THE STATE COMMISSION ON JUDICIAL CONDUCT FILED OCTOBER 24, 2002

BEFORE THE STATE COMMISSION ON JUDICIAL CONDUCT

INQUIRY CONCERNING

HONORABLE TERRY A. CANALES

JUDGE NO. 84

COMMISSION'S FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

On the 11th day of October, 2002, the Slate Commission on Judicial Conduct considered the Record of the Formal Proceedings involving Judge No. 84, the Honorable Terry A. Canales, Judge of the 79th Judicial District Court, Alice, Jim Wells County, Texas. The record included the Findings of Fact of the Commission signed August 27, 2002 by six members of the State Commission on Judicial Conduct.

Before taking action on the Record of the Formal Proceedings, the Commission also considered Respondent's Statement of Objections to Commission's Findings of Fact filed with the Commission on September 26, 2002; Examiner's Response to Respondent's Statement of Objections to the Commission's Findings of Fact filed with the Commission on October 9, 2002; heard oral argument from Judge Canales' counsel, Augustin Rivera and Darrell L. Barger, Special Counsel, David Horton, and Examiner, Jacqueline R. Habersham.

Appendix B

After due consideration, the Commission enters the following:

FINDINGS

The Commission overrules the Respondent's Statement of Objections to Commission's Findings of Fact filed with the Commission on September 26, 2002, and adopts and affirms the Findings of Fact of the Commission signed on August 27, 2002, with only one amendment to the Findings. Specifically, the Commission finds that Paragraph 7 of the Findings of Fact should be amended to read:

> "In or around August 1996, during regular business hours, Judge Canales engaged in the inappropriate physical touching and kissing of Liana Barrera, his secretary, while in his chambers located in Alice, Jam Wells County, Texas."

CONCLUSIONS

The Commission makes and enters the following conclusions:

CONCLUSIONS ON CHARGE I
INAPPROPRIATE PHYSICAL TOUCHING

1. Judge Canales' action on or about March 28, 2000, during regular business hours, in engaging in inappropriate nonconsensual physical touching of Rosario Hernandez while the two were meeting in his chambers located at the courthouse in Falfurrias, Brooks County, Texas, was

willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

2. Judge Canales' action on or about March 28, 2000, during regular business hours, in engaging in inappropriate nonconsensual physical touching of Rosario Hernandez while the two were meeting in his chambers located at the courthouse in Falfurrias, Brooks County, Texas, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

3. Judge Canales' action on or about April 20, 2000, during regular business hours, in engaging in inappropriate nonconsensual physical touching of Frances Delgado while the two were meeting in his chambers located at the courthouse in Alice, Jim Wells County, Texas, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

4. Judge Canales' action on or about April 20, 2000, during regular business hours, in engaging in inappropriate nonconsensual physical touching of Frances Delgado while the two were meeting in his chambers located at the courthouse in Alice, Jim Wells County, Texas, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

5. Judge Canales' action in or around August 1996, during regular business hours, in engaging in inappropriate physical touching and kissing of Liana Barrera, his secretary, while in his chambers located in Alice, Jim Wells County, Texas, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

6. Judge Canales' action in or around August 1996, during regular business hours, in engaging in inappropriate physical touching and kissing of Liana Barrera, his secretary, while in his chambers located in Alice, Jim Wells County, Texas, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

CONCLUSIONS ON CHARGE II
SEXUALLY SUGGESTIVE COMMENTS

1. Judge Canales' action on or about February 5, 2000, in making sexually suggestive comments to Rosario Hernandez, an employee with the Brooks County District Attorney's office, during an unsolicited telephone conversation, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

2. Judge Canales' action on or about February 5, 2000, in making sexually suggestive comments to Rosario

Hernandez, an employee with the Brooks County District Attorney's office, during an unsolicited telephone conversation, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

3. Judge Canales' action on or about April 20, 2000, during the meeting in his chambers, in making sexually suggestive comments to Frances Delgado, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

4. Judge Canales' action on or about April 20, 2000, during the meeting in his chambers, in making sexually suggestive comments to Frances Delgado, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

CONCLUSIONS ON PERSISTENT CONDUCT CHARGE I

1. Judge Canales' actions 1) on or about March 28, 2000, in engaging in inappropriate nonconsensual physical touching of Rosario Hernandez while the two were meeting in his chambers .. . ; 2) on or about April 20, 2000, in engaging in inappropriate nonconsensual physical touching of Frances Delgado while the two were meeting in his chambers ... ; and 3) in or around August 1996, in engaging in inappropriate physical touching and

kissing of Liana Barrera while in his chambers ... constitute persistent conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section I-a(6)A of the Texas Constitution.

2. Judge Canales' actions 1) on or about March 28, 2000, in engaging in inappropriate nonconsensual physical touching of Rosario Hernandez while the two were meeting in his chambers .. . ; 2) on or about April 20, 2000, in engaging in inappropriate nonconsensual physical touching of Frances Delgado while the two were meeting in his chambers ... ; and 3) in or around August 1996, in engaging in inappropriate physical touching and kissing of Liana Barrera while in his chambers ... constitute persistent conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section I-a(6)A of the Texas Constitution.

CONCLUSIONS ON PERSISTENT CONDUCT CHARGE II

1. Judge Canales' actions 1) on or about February 5, 2000, in making sexually suggestive comments to Rosario Hernandez ... ; and 2) on or about April 20, 2000, in making sexually suggestive comments to Frances Delgado ... constitute persistent conduct that was clearly inconsistent with the proper performance of his duties, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

2. Judge Canales' actions 1) on or about February 5, 2000, in making sexually suggestive comments to Rosario Hernandez ... ; and 2) on or about April 20, 2000, in making sexually suggestive comments to Frances Delgado ... constitute persistent conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article 5, Section 1-a(6)A of the Texas Constitution.

RECOMMENDATIONS

Based on the above Findings of Fact and Conclusions, the State Commission on Judicial Conduct, by affirmative vote of six (G) or more members, recommends:

1. that the Supreme Court of Texas appoint a Review Tribunal pursuant to the provisions of Article 5, Section 1-a(8) of the Texas Constitution;

2. that Judge Terry A. Canales, 79th Judicial District Court, Jim Wells County, Texas, be removed from office; and

3. that the Review Tribunal further issue an order, pursuant to the provisions of Article 5, Section 1-a(9) of the Texas Constitution, prohibiting Judge Canales from holding judicial office in the future.

Appendix B

Certified by my hand and seal this 23rd day of October, 2002.

s/ Kathleen H. Olivares

Judge Kathleen H. Olivares
Chair
State Commission on Judicial Conduct

APPENDIX C — EXCERPTS OF ORDERS PRONOUNCED SEPTEMBER 24, 2004

THE SUPREME COURT OF TEXAS

Orders Pronounced September 24, 2004

ORDERS ON CAUSES

* * *

THE JUDGMENTS OF THE REVIEW TRIBUNALS IN THE FOLLOWING APPEALS ARE AFFIRMED:

03-1044 IN RE TERRY A. CANALES, JUDGE, 79TH DISTRICT COURT OF TEXAS v. STATE COMMISSION ON JUDICIAL CONDUCT
INQUIRY NO. 84; from Jim Wells County
motion for rehearing denied
order of April 9, 2004, denying the petition for review, withdrawn

(Chief Justice Jefferson not sitting)

* * * *

APPENDIX D — CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Due Process Clause of section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, §1.

Section 1-a(9) of Article V of the Texas Constitution addresses the propriety of compelled forfeiture of judicial pensions and provides, in pertinent part:

> (9) A tribunal to review the Commission's recommendation for the removal or retirement of a person holding an office or position specified in subsection (6) of this Section is composed of seven (7) Justices or Judges of the Courts of Appeals who are selected by lot by the Chief Justice of the Supreme Court. Each Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made. Service on the tribunal shall be considered

> part of the official duties of a judge, and no additional compensation may be paid for such service. The review tribunal shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence. Within 90 days after the date on which the record is filed with the review tribunal, it shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. A Justice, Judge, Master, or Magistrate may appeal a decision of the review tribunal to the Supreme Court under the substantial evidence rule. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The review tribunal, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary.

TEX. CONST., art. V, §1-a(9).

Rule 13 of the Texas Rules for Removal or Retirement of Judges further provides:

> A judge may appeal a decision of the review tribunal to the supreme court under the substantial evidence rule.

TEX. R. REM'L/RET. JUDG. 13 (West 1996).

APPENDIX E — ISSUES PRESENTED IN APPELLATE BRIEFS

ISSUES PRESENTED IN BRIEFS OF APPELLANT TERRY CANALES TO THE SUPREME COURT OF TEXAS

Issue One

Given this Court's declaration in *In re Laughlin* that the standard of proof must be clear and convincing when an elected judge is removed from office and given the overwhelming majority of ~~Texas's~~ sister states requiring that same burden of proof in judicial disciplinary proceedings,

(a) Did the Review Tribunal erroneously affirm the recommendation of removal and lifetime ban based on a preponderance of the evidence?

(b) Can the evidence of two complainants, the other two having been struck, support the Commission's recommendation of removal and lifetime ban for violation of Article V, section 1-a(6)'s willful or persistent misconduct provision, when subjected to the clear and convincing standard of proof and review?

(c) Does the imposition of a preponderance of evidence standard of proof and review violate Judge Canales's due process rights?

(d) Should this Court wholly reject the Commission's sanction recommendation as not being supported by clear and convincing evidence?

* * * *

Issue Three

The Tribunal erroneously relied on Government Code pension forfeiture provisions applicable to impeachment proceedings or removal for official misconduct. Because this proceeding before the Commission was under article V, section 1-a for willful or prejudicial misconduct, rather than official misconduct, did the Tribunal commit a clear error of law which requires correction by this constitutionally guaranteed appeal?

Appendix E

ISSUES PRESENTED IN PETITIONER'S BRIEF TO THE REVIEW TRIBUNAL APPOINTED BY THE SUPREME COURT OF TEXAS

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4. Did the Commission use an improper legal standard in arriving at its Findings, Conclusions and Recommendations?

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11. Have the Petitioner's constitutional rights under the Texas and U.S. Constitutions been violated as a result of the manner in which the proceedings were conducted, the standards and procedures applied, and the conclusions drawn and recommendations made?

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